

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 469 Salvage of Pleasure Vessels

**SPONSOR(S):** Natural Resources & Public Lands Subcommittee, Careers and Competition Subcommittee and Harrison

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 664

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Natural Resources & Public Lands Subcommittee	13 Y, 0 N, As CS	Moore	Shugar
2) Careers & Competition Subcommittee	9 Y, 2 N, As CS	Willson	Anstead
3) Government Accountability Committee			

### SUMMARY ANALYSIS

Currently, state law does not require salvors of pleasure vessels to notify customers regarding the potential costs prior to salvage. Salvage is the amount allowed to persons who voluntarily assist a ship at sea or her cargo or both, whether saved in whole or in part from impending sea peril, or in the recovery of such property from actual peril or loss. In determining a salvage award, several factors are considered resulting in awards ranging from a few hundred dollars to thousands of dollars.

The bill defines terms and provides that, before a salvor may engage in the salvage operation of a pleasure vessel, the salvor shall provide the customer with verbal and written notice that the service offered is not covered by any towing contract. The bill specifies that a salvor is not required to provide the verbal and written notice if there is an imminent threat of injury or death to any person on board the vessel. The bill applies, with a few exceptions, to all salvors operating in Florida.

The bill requires that the written notice include specific language, in capital letters of at least 12-point type, which can be summarized as follows:

- Salvage work is not covered by any towing service contract.
- The salvor may present the customer, or their insurance company, with the bill at a later date.
- The bill will be calculated in accordance with federal salvage law, which may exceed a charge based on time and materials, and may amount to the entire value of the vessel and its contents.
- If the customer agrees to allow the salvor to perform the work, the only recourse for challenging the bill is a lawsuit in federal court or, if customer agrees, binding arbitration.
- The customer may agree to the charges before work begins, and that agreed amount will be the maximum that the salvor may charge. The customer has the right to reject the salvor's offer if the salvor does not agree to a charge before beginning work.

The bill provides that a customer injured by a violation who prevails in court is entitled to damages in the amount of 1.5 times that charged by the salvor, plus actual damages, court costs, reasonable attorney fees, injunctive relief, and any other remedy provided by law.

The bill does not appear to have a fiscal impact on state or local government.

The bill provides for an effective date of July 1, 2018.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Present Situation

Generally, only a vessel of the United States or a numbered motorboat owned by a citizen may engage in any salvage operation in territorial waters of the United States.<sup>1</sup>

“Salvage is the compensation allowed to persons by whose voluntary assistance to a ship at sea or her cargo or both have been saved in whole or in part from impending sea peril, or in recovering such property from actual peril or loss, as in cases of shipwreck, derelict, or recapture.”<sup>2</sup>

Federal law provides for the following factors that have traditionally been considered in determining a salvage award:

- the labor expended by the salvors in rendering the salvage service;
- the promptitude, skill, and energy displayed in rendering the service and saving the property;
- the value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed;
- the risk incurred by the salvors in securing the property from the impending peril;
- the value of the property saved; and
- the degree of danger from which the property was rescued.<sup>3</sup>

The 1989 International Convention on Salvage, to which the United States is a party,<sup>4</sup> added additional factors to consider when making a salvage award determination, which include consideration for prevention or minimization of environmental damage.<sup>5</sup>

In weighing these factors, a salvage award can vary greatly from a few hundred dollars<sup>6</sup> to thousands of dollars.<sup>7</sup> Currently, neither federal nor state law require salvors to notify customers of the potential costs involved in the salvage of their vessel.

##### *United States Coast Guard and the Commercial Towing Industry*

Historically, the United States Coast Guard performed the majority of all the on-the-water assistance required by boaters in the United States.<sup>8</sup> In 1982, Congress directed the Coast Guard “to review Coast Guard policies and procedures for towing and salvage of disabled vessels in order to further minimize

---

<sup>1</sup> 19 C.F.R. § 4.97(a) (1969).

<sup>2</sup> *The Sabine*, 101 U.S. 384 (1879).

<sup>3</sup> *The Blackwall*, 77 US. 1 (1869).

<sup>4</sup> United Nations. *International Convention on Salvage*, <https://treaties.un.org/doc/Publication/UNTS/Volume%201953/v1953.pdf>, (last visited Nov. 17, 2017).

<sup>5</sup> *International Convention on Salvage, 1989*, <http://treaties.fco.gov.uk/docs/pdf/1996/TS0093.pdf> (last visited Nov. 17, 2017);

International Maritime Organization. *International Convention on Salvage*.

<http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Salvage.aspx>, (last visited Nov. 17, 2017).

<sup>6</sup> *Hernandez v. Roberts*, 675 F.Supp. 1329, (S.D.Fla.1988).

<sup>7</sup> *Lewis v. JPI Corp.*, No. 07-20103-CIV, 2009 WL 3761984 (S.D. Fla. Nov. 9, 2009); *Esoteric, LLC v. One (1) 2000 Eighty-Five Foot Azimut Motor Yacht Named M/V “Star One”*, No. 10-15652 (11th Cir. June 12, 2012).

<sup>8</sup> C-PORT & Capt. Steve Winkler, *Liability and Assistance Towing: Issues of interest to Harbormasters, Marine Police, Fire, and other Local and State Marine Response Units*, (2010), at 1, available at

<http://cport.wsiefusion.net/Images/AnnouncementImages/Liability%20and%20Assistance%20Document%202010.pdf>

the possibility of Coast Guard competition or interference with ... commercial enterprise.”<sup>9</sup> According to the Coast Guard, “the review was directed because of congressional concern that Coast Guard resources were being used unnecessarily to provide non-emergency assistance to disabled vessels that could be adequately performed by the private sector.”<sup>10</sup> The Coast Guard responded with its Maritime Search and Rescue Assistance Policy (MSAP), which gave rise to the commercial assistance towing industry we are familiar with today.<sup>11</sup>

The Coast Guard is prohibited from charging a fee for search and rescue services<sup>12</sup>, and generally does not provide assistance to recreational boaters when a commercial towing service is able to respond. Coast Guard regulations provide that “rescue operations may also be performed for the purpose of preventing or mitigating property loss or damage. However, missions shall not normally be performed for the purpose of salvage or recovery of property when those actions are not essential to the saving of life.”<sup>13</sup>

### Towing<sup>14</sup>

A common affirmative defense to a salvage claim is that the services rendered constituted “simple towage” services rather than salvage services.<sup>15</sup> Simple towage, as opposed to salvage, is a towage service that is based on the “employment of one vessel to expedite the voyage of another, when nothing more is required than the [acceleration of the second vessel's] progress.”<sup>16</sup> Simple towage is regarded as having taken place when a tow was called for or taken by a sound vessel merely as a means of saving time or for convenience.<sup>17</sup>

The hallmark of simple towage is the absence of peril. For example, in *American Home Assurance Co. v. L & L Marine Service, Inc.*, 875 F.2d 1351 (8th Cir. 1989), the court held that a grounded vessel with fuel leaking into the surf was in peril when rescued by the Coast Guard, but it was no longer in peril after being pulled into open water; therefore, the tow back to port was evaluated as towage services, not salvage services.

The typical simple towage case arises when a power vessel has run out of fuel or is disabled and becomes adrift at sea, but the only assistance required is a tow to a safe mooring.<sup>18</sup> In simple towage cases, the level of towage services is extremely low if rendered in harbor or close to shore, in calm weather, or when numerous other vessels or towboats are available to render the same service.<sup>19</sup> It is the almost-universal practice of salvors to provide towage services on a fixed-price basis or hourly rate. The distinction between towage and salvage is important because when good weather and calm seas are replaced with high seas and an approaching hurricane, or when the locale is moved many miles

---

<sup>9</sup> U.S. Department of Homeland Security, United States Coast Guard, ADDENDUM TO THE UNITED STATES NATIONAL SEARCH AND RESCUE SUPPLEMENT (NSS) to The International Aeronautical and Maritime Search and Rescue Manual (IAMSAR), Section 4.1, Maritime SAR Assistance Policy (MSAP) at 4-5. (January 2013).

<sup>10</sup> USCG, ADDENDUM TO THE UNITED STATES NATIONAL SEARCH AND RESCUE SUPPLEMENT (NSS) at 4-5.

<sup>11</sup> David Weil, *How do the U.S. Coast Guard, SeaTow and Vessel Assist respond to distress calls?* Boating World Magazine (January 7, 2015), <http://www.boatingworld.com/asktheattorney/ask-the-attorney-2015-01-02/>

<sup>12</sup> 46 U.S.C. 2110(a)(5).

<sup>13</sup> USCG, ADDENDUM TO THE UNITED STATES NATIONAL SEARCH AND RESCUE SUPPLEMENT (NSS), at PPO-2.

<sup>14</sup> MARITIME LAW AND PRACTICE at 10-11.

<sup>15</sup> The admiralty courts of the United States have addressed the difference between “simple towage” and salvage services on numerous occasions and have expressly held that, in most situations, services rendered by a salvor constitute salvage services. *See, e.g., Mississippi Valley Barge Line Co. v. Indian Towing Co.*, 232 F.2d 750 (5th Cir. 1956).

<sup>16</sup> *The Princess Alice*, 3 W.Rob. 138, 140 (1849).

<sup>17</sup> *Scott v. The Clara E. Bargain*, 21 F.Cas. 1201 (D. S.C. 1882). *See* 3A BENEDICT ON ADMIRALTY § 185 (Matthew Bender & Co. 7th rev. ed. 1993).

<sup>18</sup> *See, e.g., Baker v. Hemenway*, 2 F.Cas. 463 (D. Mass. 1876).

<sup>19</sup> *See, e.g., J.M. Guffey Petroleum Co. v. Borison*, 211 F. 594 (5th Cir. 1914); *Sears v. S.S. American Producer*, 1972 A.M.C. 1647 (N.D. Cal. 1972).

offshore where no other assistance is available, the entire context of the services and their value change radically.<sup>20</sup>

Membership organizations such as Sea Tow<sup>21</sup> and or Boat Owners Association of The United States (BoatU.S.)<sup>22</sup> offer annual memberships for specific marine services at fixed rates. For example, the Sea Tow membership offers certain, limited service privileges, such as towing, alternatives to towing, ungroundings and dock-to-dock tows.<sup>23</sup> The membership agreement explicitly states that “Salvage operations, including, but not limited to, vessels abandoned, wrecked, beached, on fire, damaged by fire, taking on water, sinking, sunk, previously sunk, in the surf or surf line, or in any other state of peril, are not privileges of membership.”<sup>24</sup>

### *Jurisdiction*

Salvage is a concept exclusively within federal maritime law and is not a part of state common law.<sup>25</sup> Federal district courts have original jurisdiction for any civil case of admiralty or maritime jurisdiction, exclusive of the courts of the States saving to suitors in all cases all other remedies to which they are otherwise entitled.<sup>26</sup> Salvage awards are unique to maritime and admiralty law, and unlike other areas of law where the amount of the award is calculated as fair compensation for work performed, salvage generously rewards the voluntary salvor for public policy purposes.<sup>27</sup>

A salvor may bring its action in state court, under certain circumstances.<sup>28</sup> If the parties have entered into a contract, which itself provides the means for measurement of the salvage award, the salvage action may proceed in contract, which is clearly a remedy provided within state court jurisdiction.<sup>29</sup>

When the object of salvage is located in non-navigable waters (e.g., a lake that is not navigable to another state or the sea), there is no admiralty jurisdiction and no cause of action for marine salvage.<sup>30</sup>

---

<sup>20</sup> See, e.g., *The Mercer*, 297 F. 981 (2d Cir. 1924). *Evanow v. M/V Neptune*, 163 F.3d 1108 (9th Cir. 1998) (when vessel adrift during storm conditions was assessed by Coast Guard as pollution risk, that was peril that justified salvage situation); *The Catalina*, 105 F. 633 (5th Cir. 1900) (when steamship in Gulf of Mexico, 60 miles from mouth of Mississippi, was disabled by breaking of her shaft beyond any temporary repairs that could be made, and in need of assistance to reach her port, although not in immediate peril, she was so in distress that aid voluntarily given her by towing her to mouth of river constituted salvage services); *The Rebecca Shepherd*, 148 F. 727 (D. Me. 1906).

<sup>21</sup> See <https://www.seatow.com/membership/membership-agreement>

<sup>22</sup> See <https://www.boatus.com/membership/>

<sup>23</sup> <https://www.seatow.com/membership/membership-agreement>

<sup>24</sup> *Id.*

<sup>25</sup> John Howard Thomas and Andrew W. Anderson, *The Florida Bar, MARITIME LAW AND PRACTICE, CH. 8: SALVAGE 3* (5<sup>th</sup> ed. 2017).

<sup>26</sup> Modern admiralty jurisdiction is codified in 28 U.S.C. § 1333

<sup>27</sup> *Lewis* at 3. See also 67B Am. Jur. 2d Salvage § 1 “Because of the commercial and humanitarian importance of aiding persons and ships in distress, as well as preserving property and maintaining navigable waterways, public policy favors rewarding seamen for salvage services on a basis far out of proportion to quantum meruit both to liberally reward them and to withdraw from them every temptation toward embezzlement and dishonesty. Courts of admiralty, therefore, do not view salvage awards merely as pay or remuneration for labor but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark on such undertakings to save life and property.”

<sup>28</sup> *Sebastian Tow Boat & Salvage, Inc. v. Vernon Stavens & Allstate Floridian Insurance Co.*, 16 FLW Fed. D187 (M.D. Fla. 2002)

<sup>29</sup> John Howard Thomas and Andrew W. Anderson, *The Florida Bar, MARITIME LAW AND PRACTICE, CH. 8: SALVAGE 4* (5<sup>th</sup> ed. 2017). “When a federal court sits as an admiralty court, it applies the general federal maritime law and federal statutes. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917), *superseded on other grounds* 459 U.S. 297. Federal district courts are granted exclusive jurisdiction for maritime cases, including salvage, under 28 U.S.C. § 1333, but the “saving to suitors clause” allows state court jurisdiction in all cases of remedies to which suitors are otherwise entitled. 28 U.S.C. § 1333(1). Thus, 28 U.S.C. § 1333(1) creates an exception to exclusive jurisdiction of the federal courts, providing for concurrent jurisdiction in state courts as well as federal question jurisdiction for admiralty-type claims pursuant to 28 U.S.C. § 1331, and allows for supplemental jurisdiction for other common-law claims in diversity within an admiralty claim. See *O'Neill v. Schoenbrod*, 355 So.2d 440 (Fla. 3d DCA 1978)(The court held that salvage, as a matter peculiarly within the jurisdiction of the admiralty courts because of the peculiar system awarding the compensation, was within the exclusive jurisdiction of the federal district court sitting in admiralty. The same plaintiff was subsequently prevented from bringing the same claim as a state court action for unjust enrichment, as a “disguised salvage claim.”)

## Cause of Action for Salvage<sup>31</sup>

Under the law of salvage, three kinds of salvage services have been recognized.<sup>32</sup>

- (1) voluntary, wherein the compensation is not contracted for and is dependent on success (i.e., pure salvage);
- (2) rendered under a contract for a per diem or per horam wage, payable at all events<sup>33</sup>; or
- (3) under a contract for a compensation payable only in case of success.

Pure salvage actions are based on the scheme of salvage awards developed under federal maritime law. Salvage services are considered “pure salvage” even when a contract exists, “if the contract does not contain either an agreement to pay a given sum or to pay without regard to success, but provides only that the salvor will be entitled to an award in the event of success on a “no cure-no pay” basis, the services do not become contract salvage but retain their status as pure salvage services.”<sup>34</sup>

To have a valid maritime salvage claim for pure salvage under either (1) or (3) above and be entitled to a liberal salvage award, a salvor first must establish that the services rendered were in fact maritime salvage services. For a valid claim of having rendered pure salvage services, a salvor must establish the following three elements by a preponderance of the evidence:

- a maritime peril<sup>35</sup> from which the ship or other property could not have been rescued without the salvor’s assistance;
- a voluntary act by the salvor without a pre-existing contractual, official, or legal duty to render assistance; and
- success in saving or helping to save at least part of the property at risk.<sup>36</sup>

A salvor must obtain permission before beginning salvage operations, or the salvor becomes a trespasser or officious intermeddler.<sup>37</sup> There is no question that salvage services cannot be thrust on an unwilling vessel master or owner who refuses them.<sup>38</sup>

When a vessel is exposed to a marine peril and no one is aboard to refuse or accept the salvage services (whether it is derelict, abandoned, or has simply been left temporarily), it is not necessary for the salvor to attempt to locate the owner or to obtain permission before undertaking salvage operations.

---

<sup>30</sup> *Id.*, citing *Historic Aircraft Recovery Corp. v. Wrecked & Abandoned Voight F4U-1 Corsair Aircraft*, 294 F.Supp.2d 132 (D. Me. 2003)

<sup>31</sup> John Howard Thomas and Andrew W. Anderson, *The Florida Bar, MARITIME LAW AND PRACTICE, CH. 8: SALVAGE* (5<sup>th</sup> ed. 2017).

<sup>32</sup> *MARITIME LAW AND PRACTICE* at 4, citing *The Elfrida*, 172 U.S. 186, 19 S.Ct. 146, 43 L.Ed. 413 (1898).

<sup>33</sup> *MARITIME LAW AND PRACTICE* at 11, “The practitioner should note that fixed-price salvage contracts are uncommon for rescues except in cases of raising vessels sunk at their berths in shallow water or in the salvage of vessels of relatively low value. Therefore, although some use is made of contract salvage for vessels, primarily in the context of wreck removal, most salvage contracts presented to vessel operators and owners are “pure salvage, no cure-no pay.””

<sup>34</sup> *The Camanche*, 75 U.S. (8 Wall.) 448, 19 L.Ed. 397 (1869).

<sup>35</sup> *MARITIME LAW AND PRACTICE* at 4-5. “To justify a salvage award, it is sufficient that, when the salvage service is rendered, the vessel has encountered danger, misfortune, peril, or other circumstances that might expose it to damage or destruction if the services were not rendered. A situation of reasonable apprehension, though not of actual danger, is sufficient . . . it is not the degree of peril that makes for salvage service. If distress or peril is present, after voluntary service and success, a valid salvage service has been performed entitling the salvor to a salvage award. The degree of peril — whether slight, moderate, or severe — affects only the amount, not entitlement to, a salvage award. *New Bedford Marine Rescue, Inc. v. Cape Jeweler's Inc.*, 240 F.Supp.2d 101 (D. Mass. 2003). Therefore, the presence of peril in any degree — whether imminent or potential, and whether the damages to the vessel are slight or nonexistent — will support a claim for salvage services. However, the degree, imminence, and extent of the peril figure largely in the amount of the salvage award.”

<sup>36</sup> *Id.*

<sup>37</sup> *Merritt & Chapman Derrick & Wrecking Co. v. United States*, 274 U.S. 611, 47 S.Ct. 663, 71 L.Ed. 1232 (1927), citing *The Annapolis*, 167 Eng.Rep. 150, 161 (P.C. 1861).

<sup>38</sup> *The Indian*, 159 F. 20 (5<sup>th</sup> Cir. 1908); *The Choteau*, 9 F. 211 (C.C. D. La. 1881); *The Bolivar*, 3 F.Cas. 1611 (C.C. D. Tex. 1872).

Under such circumstances, the salvor is not a trespasser and may proceed to assist the vessel, and make a claim for a salvage award.<sup>39</sup>

## Salvage Contracts

Standard “no cure-no pay” salvage contracts are in general use by salvors, as prepared by such entities as Lloyd's Salvage Arbitration Branch (“Lloyd's Open Form”), the Society of Maritime Arbitrators (“U.S. Open Form”) and BOAT/U.S.<sup>40</sup> Courts have found that a vessel owner is bound by signing a written salvage contract, even if later the owner claimed to have not read and understood it.<sup>41</sup>

“Many of the same factors that will void a contract under common law, such as fraud, collusion, mutual mistake, misrepresentation or suppression of material facts, or compulsion, also will void a salvage contract. An admiralty court will scrutinize a salvage contract closely for any sign of overreaching, improper coercion, or overcharging by the salvor. The court will set aside the contract if it finds that the salvor took advantage of the situation to impose unconscionable or inequitable contract terms on the vessel. Extortionate demands forced by a salvor on the master of a vessel *in extremis* not only will void the contract but often result in a salvage award that is less than it otherwise would be. If, however, the terms of the contract are reasonable and not oppressive, the contract will be upheld without regard to pressures created by the emergency faced by the vessel.”<sup>42</sup>

## Professional Salvors<sup>43</sup>

Public policy provides that, to encourage professional salvors to relieve the taxpayers from the necessity of buying, equipping, and maintaining salvage vessels, as well as training and maintaining their crews, professional salvors are entitled not only to compensation for services rendered, but to a so-called equitable “uplift” or incentive bonus to induce both small and large salvors to remain in business, prepared to respond to the next call for assistance.<sup>44</sup>

A professional salvor is entitled to claim a special bonus award for a successful salvage.<sup>45</sup> The concept that professional salvors are entitled to premium pay for successful completion of their services is longstanding and widespread.<sup>46</sup> There is strong public policy that a professional salvor is entitled to a more liberal award than an amateur or chance salvor, to encourage professional salvors to maintain salvage equipment and expertise.<sup>47</sup>

Exactly what constitutes a professional salvor has not been defined precisely. However, the court in *The Lamington* provided guidance as to this issue, in which it set out some factors as to what

---

<sup>39</sup> *Rickard v. Pringle*, 293 F.Supp. 981 (E.D. N.Y. 1968); *The Ann L. Lockwood*, 37 F. 233 (D. Del. 1888). See 3A BENEDICT ON ADMIRALTY § 136 (Matthew Bender & Co. 7th rev. ed. 1993).

<sup>40</sup> MARITIME LAW AND PRACTICE at 12. “The defense of a salvage contract may extend to a vessel owner whose vessel master has the authority to sign such agreement without special authority from the owner. *Andrews v. Wall*, 44 U.S. (3 How.) 568, 11 L.Ed. 729 (1845); *The G.W. Jones*, 48 F. 925 (S.D. N.Y. 1892). However, the vessel owner cannot assert this defense when the signing of a salvage agreement by the master after the vessel has been assisted requires authorization by the vessel owner.”

<sup>41</sup> MARITIME LAW AND PRACTICE at 12. See, e.g., *Royal Insurance Company of America v. BHRIS, LLC*, 333 F.Supp.2d 1293 (S.D. Fla. 2004) (court held that salvage contract was enforceable when boat owner asked salvor whether any money was owed for salvage and salvor replied that owner should not worry because insurance will pay).

<sup>42</sup> MARITIME LAW AND PRACTICE at 12. *The Elfrida*, 172 U.S. 186, 19 S.Ct. 146, 43 L.Ed. 413 (1898); *Magnolia Petroleum Co. v. National Oil Transport Co.*, 286 F. 40 (5th Cir. 1923); *The Emulous*, 8 F.Cas. 705 (C.C. D. Mass. 1832).

<sup>43</sup> MARITIME LAW AND PRACTICE at 14-15.

<sup>44</sup> See *In re Shopping Spree*, 1992 WL 12561364 (Arbitr. Mass. 1992); *H.R.M., Inc. v. S/V Venture VII*, 972 F.Supp. 92 (D. R.I. 1997); *H.R.M., Inc. v. S/V Martina Mia II*, 1992 A.M.C. 1347 (D. R.I. 1991).

<sup>45</sup> *B.V. Bureau Wijsmuller v. United States*, 487 F.Supp. 156 (S.D. N.Y. 1979), aff'd 633 F.2d 202

<sup>46</sup> See *The Ocklawaha*, 1964 A.M.C. 2695 (S.D. N.Y. 1963), modified 348 F.2d 627; *Devine v. United Transportation*, 1956 WL 89486 (W.D. Wash. 1956).

<sup>47</sup> 8 BENEDICT ON ADMIRALTY § 802 (Matthew Bender & Co. 7th rev. ed. 1993). See also *The Lamington*, 86 F. 675 (2d Cir. 1898); *Rainbow Line Inc. v. M/V Tequila*, 341 F.Supp. 459 (S.D. N.Y. 1972), aff'd 480 F.2d 1024.

constitutes a professional salvor, including machinery, skills, and appliances being ready for instant service, even if called for only occasionally.<sup>48</sup>

### Salvage Awards<sup>49</sup>

In determining the size of the salvage award to which the salvor is entitled, the amount of the award is not based on work and labor performed on an hourly or fixed-rate basis, but is given as a reward to ensure safety of property and life at sea. As previously stated, there is a strong public policy in favor of encouraging salvors to save and restore property to its owners and to encourage others to venture out and save distressed property. As a result, salvage awards are liberally construed in the form of a “reward,” not quantum meruit.<sup>50</sup> Specifically, public policy dictates that a salvor's award should be such as to encourage others to aid vessels in distress.<sup>51</sup>

Computation of a salvage award traditionally has followed the longstanding guidance provided by the United States Supreme Court more than a century ago. In *The Blackwall*, 77 U.S. (10 Wall.) 1, 19 L.Ed. 870 (1870), Justice Clifford set out the six factors to be considered in determining the amount of a salvage award. The Second Circuit has arranged these factors in descending order of importance as follows:

- (1) the degree of danger from which the ship was rescued;
- (2) the post-casualty value of the property saved;
- (3) the risk incurred in saving the property from impending peril;
- (d) the promptitude, skill, and energy displayed in rendering the service and salvaging the property;
- (4) the value of the property employed by the salvors and the danger to which it was exposed; and
- (5) the costs in terms of labor and materials expended by the salvors in rendering the salvage service.<sup>52</sup>

In considering its award, the court must consider not only the peril immediately faced by the vessel, but the dangers presented by the situation that reasonably might have developed but for the actions of the salvors. Although the flexible approach adopted by the United States in *The Blackwall* is still cited authority for salvage award determinations, technically the case has been superseded by the International Convention on Salvage, 1989 (“SALCON 89”), to which the United States is a party. Pursuant to the SALCON 89, there are additional factors that a court must consider when making its salvage award determination, which include consideration of life salvage and consideration for prevention of environmental damage.

Specifically, as to the second factor — the post-casualty value of the property — “[t]he salvaged value is the post-casualty value of the property, in [its] damaged state, at the time of the salvage or after the vessel is brought into safe harbor.”<sup>53</sup> Typically, the fair market value of the property determines the property value under this factor. However, when there has been no established market value, use of a pre-casualty book value for the vessel and deducting the actual cost of repairs is an acceptable measure of the vessel's value after salvage or salvaged value.<sup>54</sup> In any event, the actual selling price of

---

<sup>48</sup> *Bindon v. Jones*, 1986 A.M.C. 1403 (W.D. Wash. 1984); *B.V. Bureau Wijsmuller*.

<sup>49</sup> MARITIME LAW AND PRACTICE at 17-18.

<sup>50</sup> *B.V. Bureau Wijsmuller v. United States*, 702 F.2d 333, 339 (2d Cir. 1983); *Lancaster v. Smith*, 330 F.Supp. 65 (S.D. Ala. 1971). See also 3A BENEDICT ON ADMIRALTY § 259 (Matthew Bender & Co. 7th rev. ed. 1993).

<sup>51</sup> *Tonder v. M/V “Burkholder”*, 630 F.Supp. 691 (D.C. v.I. 1986). See also, *American Petroleum Co. v. The Veendam*, 46 F. 489 (S.D. N.Y. 1891).

<sup>52</sup> *B.V. Bureau Wijsmuller*, 702 F.2d at 339. See *Brown v. Johansen*, 881 F.2d 107 (4th Cir. 1989); *Platoro Limited, Inc. v. Unidentified Remains of a Vessel*, 695 F.2d 893, 904 (5th Cir. 1983); *Ocean Services Towing & Salvage, Inc. v. Brown*, 810 F.Supp. 1258 (S.D. Fla. 1993).

<sup>53</sup> *Lewis v. JPI Corp.*, 2009 WL 3761984, \*7 (S.D. Fla. 2009), citing *Beach Salvage Corp. of Florida v. The Cap't. Tom*, 201 F.Supp. 479 (S.D. Fla. 1961). See also 3A BENEDICT ON ADMIRALTY, *supra*.

<sup>54</sup> *The Oxford*, 66 F. 590 (5th Cir. 1895); *San Francisco Bar Pilots v. Vessel Peacock*, 733 F.2d 680 (9th Cir. 1984); *Girard v. The M/Y “Quality Time”*, 4 F.Supp.3d 1352 (S.D. Fla. 2014), *aff'd in part* 596 F.App'x 846.

the salvaged vessel, if conducted in a commercially reasonable manner, “is the best manifestation of the fair market value of the [vessel].”<sup>55</sup>

The court will consider that a salvage award, as a percentage of the salvaged vessel's value, should be adjusted so that the salvor is fairly compensated without undue hardship to the salvaged vessel owner. The courts recognize that a generous award to the salvor should be allowed when the salvaged property value justifies a high award, to compensate salvors for services that are frequently performed when the property is so small that adequate remuneration cannot be given without a hardship to the owner.<sup>56</sup> If it becomes apparent to the court that the proceeds of any sale would clearly be inadequate to pay the salvor its full reward, the court might, as a matter of discretion, award the salvor title to the property in lieu of the proceeds of sale, thereby saving the costs of sale. The salvor does not have a direct right, however, to title in the property.<sup>57</sup> When salvage expenses exceed the book value of the vessel and the owner fails to respond in the salvage action, a court may award 100% of the vessel sale proceeds as a salvage award to the salvor.<sup>58</sup>

The time involved in a salvage operation is a factor, but is not in itself determinative. For example, in *Mahoney Marine Services, Inc. v. 28' Boston Whaler “EllieRose”*, 2002 WL 34104081 (Arbit. Pa. 2002), a 7-minute successful salvage operation to remove a vessel from a rocky beach with minimal damage justified a generous salvage award. The shortness of time required to perform rescue services does not prevent the service from being a salvage service, thereby affording a more liberal award.<sup>59</sup>

The record of salvage awards does not reveal a consistent formula for determining the value of salvage.<sup>60</sup> The awards ordinarily range from a negligible amount<sup>61</sup>, to half the value of the salvaged vessel.<sup>62</sup> In addition, as in other maritime cases, the award of attorneys' fees is discretionary and may be awarded by the court or arbitrator for acts of bad faith, either in the salvage action itself or in litigation or arbitration of the dispute.<sup>63</sup>

#### Arbitration<sup>64</sup>

Maritime arbitration is by contract.<sup>65</sup> Many salvage contracts include a provision under which disputes as to a salvor's compensation will be submitted to binding arbitration.<sup>66</sup> The most widespread of these worldwide is Lloyd's Open Form (LOF) standard salvage agreement.<sup>67</sup>

---

<sup>55</sup> *Ocean Services Towing & Salvage, Inc.*, 810 F.Supp. at 1263. See *JPI Corp.*

<sup>56</sup> *The Neto*, 15 F. 819 (S.D. Fla. 1883).

<sup>57</sup> *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 286 F.3d 194 (4th Cir. 2002).

<sup>58</sup> See, e.g., *Falgout Bros., Inc. v. S/V Pangaea*, 966 F.Supp. 1143 (S.D. Ala. 1997).

<sup>59</sup> See, e.g., *The Connemara*, 108 U.S. 352, 2 S.Ct. 754, 27 L.Ed. 751 (1883).

<sup>60</sup> A salvage award of \$4.125 million was upheld for services in rescue of a barge carrying an external fuel tank for the NASA space shuttle. *Margate Shipping Co. v. M/V Ja Orgeron*, 143 F.3d 976 (5th Cir. 1998). Additional reported awards include, but are not limited to, the following: *New Bedford Marine Rescue, Inc. v. Cape Jeweler's Inc.*, 240 F.Supp.2d 101 (D. Mass. 2003) (18% of post-casualty value for 30-foot boat); *Salty Dawg Marina, Inc. v. M/Y Eastern Star*, 2004 WL 1159544 (Arbitr. N.Y. 2004) (\$12,750 awarded for rescue of \$1 million yacht); *In re Coastal Marine Services, Inc.*, 2003 WL 21371848 (Arbitr. N.Y. 2003) (15% of post-casualty value, plus 5% uplift); *BHRS, Inc. v. M/V Big Daddy*, Case No. 3773, Soc'y of Mar. Arbitrators, Inc. (Feb. 20, 2003) (Peters, Arb.) (23% awarded); *Coastal Towing & Salvage, Inc. v. M/Y Playtime*, Case No. 3700, Soc'y of Mar. Arbitrators, Inc. (Aug. 29, 2001) (Siciliano, Arb.) (14% awarded, plus 5% uplift). For a recent, positive survey of salvage awards, see *M/Y “Quality Time”*.

<sup>61</sup> *Hernandez v. Roberts*, 675 F.Supp. 1329 (S.D. Fla. 1988) (\$500); *Reliable Salvage & Towing, Inc. v. 35' Sea Ray*, 2011 WL 1058863 (M.D. Fla. 2011) (10%)

<sup>62</sup> *Ocean Services Towing & Salvage, Inc.* (50%); *Waterman S.S. Corp. v. Shipowners & Merchants Towboat Co.*, 199 F.2d 600 (9th Cir. 1952) (55%).

<sup>63</sup> See, e.g., *Reinholtz v. Retriever Marine Towing & Salvage*, 1994 WL 930679 (S.D. Fla. 1994).

<sup>64</sup> MARITIME LAW AND PRACTICE at 25-26.

<sup>65</sup> *Continental Group, Inc. v. NPS Communications, Inc.*, 873 F.2d 613 (2d Cir. 1989).

<sup>66</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984).

<sup>67</sup> See, e.g., *Jones v. Sea Tow Services Freeport NY Inc.*, 30 F.3d 360 (2d Cir. 1994).



When there is an arbitration clause in a signed contract, the parties have at least presumptively agreed to arbitrate any disputes, including those disputes about the validity of the contract in general.<sup>68</sup> Even if a vessel owner does not read and understand the arbitration provision in a salvage contract that is signed, the arbitration agreement in the contract is binding.<sup>69</sup> Courts have not accepted the excuse of signing an arbitration contract under duress.<sup>70</sup>

For recreational boat salvage between parties who are United States citizens, involving services provided to a U.S. vessel in U.S. waters, courts have held that they will not compel arbitration in London under agreement nor enforce an arbitration award if one was entered.<sup>71</sup> Maritime arbitration in the United States is governed by two primary sources: the Federal Arbitration Act<sup>72</sup> and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”)<sup>73</sup>

### Effect of Proposed Changes

The bill requires a salvor to provide certain information to a potential customer before engaging in a salvage operation.

The bill applies to all salvors operating in Florida, with the following exceptions:

- a person who performs salvage work while employed by a municipal, county, state, or federal government when carrying out the functions of that government;
- a person who engages solely in salvage work for pleasure vessels that are owned, maintained, and operated exclusively by such person and for that person's own use or for-hire pleasure vessels that are rented for periods of 30 days or less;
- a person who owns or operates a marina or shore-based repair facility and is in the business of repairing pleasure vessels, where the salvage work takes place exclusively at that person's facility;
- a person who is in the business of repairing pleasure vessels who performs the repair work at a landside or shoreside location designated by the customer; and
- a person who is in the business of recovering, storing, or selling pleasure vessels on behalf of insurance companies that insure the vessels.

The bill provides for the following definitions:

- “Customer” as the person to whom a salvor offers salvage work;
- “Employee” as an individual who is employed full-time or part-time by a salvor and performs salvage work;
- “Pleasure vessel” as any watercraft no more than 60 feet in length which is used solely for personal pleasure, family use, or the transportation of executives, persons under the employment, and guests of the owner;

---

<sup>68</sup> *Prima Paint Corp. v. Flood & ConklinMfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967).

<sup>69</sup> *Royal Insurance Company of America v. BHRIS, LLC*, 33 F.Supp.2d 1293 (S.D. Fla. 2004).

<sup>70</sup> *Farnsworth, III v. Towboat Nantucket Sound, Inc.*, 790 F.3d 90 (1st Cir. 2015).

<sup>71</sup> *Reinholtz v. Retriever Marine Towing & Salvage*, 1993 WL 414719 (S.D. Fla. 1993), *aff'd* 46 F.3d 71. See also *Jones; Brier v. Northstar Marine, Inc.*, 1992 WL 350292 (D. N.J. 1992).

<sup>72</sup> 9 U.S.C. §§ 1-16

<sup>73</sup> 21 U.S.T. 2517, 330 U.N.T.S. 38; See also the arbitration rules of the Society of Maritime Arbitrators, Inc. (New York City — (212) 786-7404) (available at [www.smany.org/doc1-arbitrationRules.html](http://www.smany.org/doc1-arbitrationRules.html)), Miami Maritime Arbitration Council (Miami — (954) 523-1004), Houston Maritime Arbitrators Association (Houston — (713) 222-1515) (available at [www.hmaatexas.org/arbitration-rules](http://www.hmaatexas.org/arbitration-rules)), or Boat Owners Association of The United States (BoatU.S.) (Virginia — (703) 461-2878). For a detailed discussion of the governance of maritime arbitration, see Chapter 1 of the *Maritime Law and Practice* (5<sup>th</sup> ed. 2017), as well as VanVactor, *Three's a Crowd: The Unhappy Interplay Among the New York Convention, FAA, and McCarran-Ferguson Act*, 36 Tul.Mar.L.J. 313 (Winter 2011).

- “Salvage work” as any assistance, services, repairs, or other efforts rendered by a salvor relating to saving, preserving, or rescuing a pleasure vessel or its passengers and crew, which are in marine peril. Salvage work does not include towing a pleasure vessel; and
- “Salvor” as a person in the business of voluntarily providing assistance, services, repairs, or other efforts relating to saving, preserving, or rescuing a pleasure vessel or the vessel’s passengers and crew which are in marine peril, in exchange for compensation.

The bill provides that, before a salvor may engage in the salvage operation of a pleasure vessel, the salvor shall provide the customer with verbal and written notice that the service offered is not covered by any towing contract.

The bill provides that the written notice must include the following statement, in capital letters of at least 12-point type:

THE SERVICE OFFERED BY THE SALVOR IS CONSIDERED SALVAGE WORK AND IS NOT COVERED BY ANY TOWING SERVICE CONTRACT. SALVAGE WORK ALLOWS THE SALVOR TO PRESENT YOU, OR YOUR INSURANCE COMPANY, WITH A BILL FOR THE CHARGES AT A LATER DATE. THE SALVOR SHALL CALCULATE THE CHARGES ACCORDING TO FEDERAL SALVAGE LAW AND SUCH CHARGES MAY EXCEED A CHARGE BASED ON A TIME AND MATERIALS CALCULATION. THE CHARGES COULD AMOUNT TO AS MUCH AS THE ENTIRE VALUE OF YOUR VESSEL AND ITS CONTENTS.

IF YOU AGREE TO ALLOW THE SALVOR TO PERFORM THE OFFERED WORK, YOUR ONLY RECOURSE TO CHALLENGE THE ASSESSED CHARGES IS BY A LAWSUIT IN FEDERAL COURT OR, IF YOU AGREE, BY BINDING ARBITRATION.

YOU MAY AGREE TO THE CHARGES WITH THE SALVOR BEFORE WORK BEGINS, AND THAT AGREED AMOUNT SHALL BE THE MAXIMUM AMOUNT THE SALVOR MAY CHARGE. YOU HAVE A RIGHT TO REJECT THE SALVOR'S OFFER OF SERVICES IF THE SALVOR WILL NOT AGREE TO A CHARGE BEFORE BEGINNING WORK.

The bill specifies that a salvor is not required to provide the verbal and written notice if there is an imminent threat of injury or death to any person on board the vessel.

The bill provides that a customer injured by a violation may bring an action in the appropriate court for relief. A customer who prevails is entitled to damages equal to 1.5 times that charged by the salvor, plus actual damages, court costs, and reasonable attorney fees. The customer may also bring an action for injunctive relief in circuit court. The bill provides that these remedies are in addition to any other remedy provided by law.

## B. SECTION DIRECTORY:

Section 1. Creates s. 559.9602, F.S.; providing scope and application; providing definitions; requiring salvors of pleasure vessels to provide specified verbal and written notice; providing an exception; providing remedies; specifying that such remedies are in addition to others provided by law.

Section 2. Provides an effective date of July 1, 2018.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

The U.S. Constitution grants federal district courts judicial power over of any civil case of admiralty or maritime jurisdiction.<sup>74</sup> While it is established that federal courts have exclusive jurisdiction over *in rem* actions,<sup>75</sup> or actions directly against the property, courts are split as to whether states can handle admiralty or maritime *in personam*, actions directly against the person, or claims for *quantum meruit*.<sup>76</sup> Generally, state courts may apply state law to maritime actions so long as there is no conflict with federal law.<sup>77</sup>

---

<sup>74</sup> U.S. Const. Art. III, ss. 1 and 2.

<sup>75</sup> *Madruga v. Superior Court of State of California ex. Rel San Diego County*, 346 U.S. 556 (1954).

An action “*in rem*” is an action brought directly against the property, which typically the vessel in admiralty law, that relates to the claim. An action *in personam* is an action against a person, and is usually based on the personal liability of the other party. See Robert Force, *Admiralty and Maritime Law*, Federal Judicial Center, at 30-31 (2013). Available at <https://www.fjc.gov/sites/default/files/2014/Admiralty2d.pdf>

<sup>76</sup> See *Metropolitan Dade County v. One (1) Bronze Cannon*, 537 F.Supp. 923 (S.D. Fla. 1982) (explaining the “saving to suitors” clause affords litigants a choice of remedies but not forums) and *Lewis v. JPI Corp.*, Case No. 07-20103-CIV-TORRES (S.D. Fla. 2009) (“The salvage award, which is unique to maritime and admiralty law, is not one of *quantum meruit* as compensation for work performed”). Compare *Sebastian Tow Boat & Salvage*, *supra* note 6 and *Phillips v. Sea Tow/ Sea Spill of Savannah*, 578 S.E.2d 846 (Ga. 2002). *Quantum meruit*, damages are calculated based on the reasonable value of the labor performed and the market value of the materials furnished to the project. See *Moore v. Spanish River Land Co.*, 159 So. 673, 674 (Fla. 1935).

<sup>77</sup> *Madruga*, 346 U.S. 556 (1954).

The bill provides a legal remedy for injured customers and directs the court to award damages to a prevailing customer, including reasonable attorney fees. Federal maritime law does not award attorney fees to a prevailing party.<sup>78</sup> It is unclear whether a federal court or state court would have jurisdiction over a dispute arising from a cause of action provided by the bill. If the dispute is considered an *in personam* claim concerning a contractual agreement, it may fall within the jurisdiction of a state court. However, if a dispute arising from a cause of action provided by the bill is considered to fall exclusively within federal maritime jurisdiction, the language in the bill directing the court to award attorney fees to the prevailing party may be preempted by general maritime law.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

Section 1 of the bill, on lines 85-93, provides that:

“(4)(a) Any customer injured by a violation of this section may bring an action in the appropriate court for relief. A customer who prevails in such an action is entitled to damages equal to 1.5 times the amount charged by the salvor, plus actual damages, court costs, and reasonable attorney fees. The customer may also bring an action for injunctive relief in the circuit court.

(b) The remedies provided for in this subsection shall be in addition to any other remedy provided by law.”

It is unclear what would be considered an actionable “violation” under the bill. The strike-all amendment (adopted by the Careers and Competition Subcommittee on January 16, 2018), removed most, if not all, of the potential violations or causes of action included in earlier versions of the bill. For example, the former “Unlawful acts and practices,” which listed nine specific violations of the act, was removed

Additionally, the bill requires that the written notice state that “YOUR ONLY RECOURSE TO CHALLENGE THE ASSESSED CHARGES IS BY A LAWSUIT IN FEDERAL COURT OR, IF YOU AGREE, BY BINDING ARBITRATION”, which seems to contradict the remedy language quoted above, which provides that the customer “may bring an action in the appropriate court for relief” and “may also bring an action for injunctive relief in the circuit court” and “the remedies provided for in this subsection shall be in addition to any other remedy provided by law”.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On December 6, 2017, the Natural Resources & Public Lands Subcommittee adopted two amendments and reported the bill favorable with committee substitute. The amendments:

- Direct the Division of Law Revision and Information to change the title of part XII of ch. 559, F.S., from “Miscellaneous Provisions” to “Internet Sales,” and to create a new part XIII of ch. 559, F.S., consisting of ss. 559.9601-559.9608, F.S., to be entitled “Salvage of Pleasure Vessels;”
- Exempt any person who is in the business of recovering, storing, or selling pleasure vessels on behalf of insurance companies that insure the vessels from the Act;
- Clarify the definition of “pleasure vessel;” and
- Require a salvor to present a written disclosure statement to the customer if the salvage work will exceed \$500, the customer is present on the vessel, and there is no imminent threat of injury or death to any person.

---

<sup>78</sup> *Garan Inc. v. MV Aivik*, 907 F.Supp. 397 (S.D. Fla. 1995) (holding that absent specific federal statutory authorization, federal maritime law does not entitle a prevailing party an award of attorney fees).

On January 16, 2018, the Careers and Competition Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment makes the following changes:

- Redefines “customer” to mean the person to whom a salvor offers salvage work;
- Revises the disclosure provision to only require that, before a salvor may engage in the salvage operation of a pleasure vessel, the salvor shall provide the customer with verbal and written notice that the service offered is not covered by any towing contract;
- Substantially revises the content of the written notice;
- Relieves the salvor from providing the verbal and written notice if there is an imminent threat of injury or death to anyone aboard the vessel;
- Removes all provisions relating to the salvage work estimate;
- Removes all provisions relating to the notification of charges in excess of the salvage estimate and to unlawful charges;
- Removes provisions relating to required disclosure, signs, and notice to customer;
- Removes all provisions relating to unlawful acts and practices;
- Removes the provision directing the Division of Law Revision and Information to re-designate statutes; and
- Reduces the damages multiplier in the remedies provision, from “three times that” to “1.5 times that” charged by the salvor.

This analysis is drafted to the committee substitute to the committee substitute as adopted by the Careers and Competition Subcommittee.